VIA CM/ECF

July 2, 2020

The Honorable Sallie Kim
United States District Court
for the Northern District of California
Courtroom C – 15th Floor
450 Golden Gate Avenue
San Francisco, California 94102

Re: *Rearden LLC et al. v. The Walt Disney Company et al.*, No. 17-CV-04006-JST
Rearden LLC et al. v. Twentieth Century Fox Film Corporation et al., No. 17-CV-04191-JST

Dear Judge Kim:

This is Defendants' letter brief for the July 6, 2020 Discovery Conference. Plaintiffs raise two issues.

1. Plaintiffs' challenge to Defendants' privilege claim over portions of an email string among non-lawyer employees reflecting their questions and counsel's legal advice: The email string reflects legal advice from one of Defendants' in-house lawyers, Bridget Hauserman, in response to questions that non-lawyers raised after receiving an article discussing Judge Tigar's preliminary injunction order in *Virtual Global Holdings Ltd. ("VGH") v. Rearden LLC*, No. 4:15-cv-00797-JST (Dkt. 188). VGH is the parent company of special-effects vendor Digital Domain 3.0 ("DD3").

Plaintiffs argue (a) that because Ms. Hauserman did not send or receive the emails, Defendants cannot claim privilege over them; and (b) even if Defendants may claim privilege over some emails—specifically, those that refer to Ms. Hauserman by name—Defendants cannot claim privilege over emails in the string that do not call out counsel. Plaintiffs are wrong. As Judge Ryu summarized the law in a recent decision: "The attorney-client privilege 'may attach

to communications between nonlegal employees where: (1) the employees discuss or transmit legal advice given by counsel; and (2) an employee discusses her intent to seek legal advice about a particular issue.'" *Dolby Labs. Licensing Corp. v. Adobe Inc.*, 402 F. Supp. 3d 855, 866 (N.D. Cal. 2019) (quoting *Datel Holdings Ltd. v. Microsoft Corp.*, No. 09-cv-05535-EDL, 2011 WL 866993, at *5 (N.D. Cal. Mar. 11, 2011)). That is exactly what happened here.

The background is as follows: On June 16, 2016, Judge Tigar entered the preliminary injunction in *VGH v. Rearden*. The Order provided, among other things, that VGH was enjoined "from selling, using, moving, concealing, transferring or otherwise disposing of any MOVA Asset in its possession, custody or control." *VGH v. Rearden* Dkt. 188 at 15-16. None of the Defendants in the cases now pending before Judge Tigar and Your Honor were parties to *VGH v. Rearden*.

On June 28, 2016, *The Hollywood Reporter* ran an article about Judge Tigar's injunction. On that date, one of Defendants' employees, Evan Feuerman, saw the article on a news-site and forwarded it to one of his colleagues, Joseph Bonander. Mr. Feuerman was not involved with *Beauty and the Beast*, but he knew that Mr. Bonander had reviewed vendor contracts for that movie, and that DD3 was a special-effects vendor for the movie. Mr. Feuerman sent a link to *The Hollywood Reporter* story to Mr. Bonander with a message: "Just making sure you guys are aware of this." Defendants have not claimed privilege over—and have produced—the email from Mr. Feuerman to Mr. Bonander.

Defendants have claimed privilege over—and therefore have redacted—the four subsequent emails in the string:

(1) On June 28, 2016, a few minutes after receiving Mr. Feuerman's email, Mr. Bonander forwarded the email to Mimi Steele, Vice President, Visual Effects at Walt Disney

Pictures Productions, LLC, and several of her colleagues. Mr. Bonander's email included a question arising out of the subject of Mr. Feuerman's email.

(2) Mr. Bonander's email prompted a response from Ms. Steele, also on June 28. In that email, Ms. Steele said that she had spoken to Ms. Hauserman (the in-house lawyer) and relayed Ms. Hauserman's legal advice.

(3) One week later, on July 5, Dave Taritero, Ms. Steele's boss (who also was on the email chain), sent an email reply to the group with a follow-up question.

(4) Later that day, July 5, Ms. Steele responded to the question in Mr. Taritero's email. Ms. Steele's response again relayed legal advice from Ms. Hauserman. That is the end of the email chain.

In their meet-and-confer letter, Plaintiffs argued that none of the four emails described above can be privileged because Ms. Hauserman, the in-house lawyer, did not send or receive any of them. As discussed, the law does not require that the lawyer be a sender or recipient for a document to be privileged. The emails reflect that (a) business people had questions arising out of a report about an injunction having issued in *VGH v. Rearden*; and (b) one of those business people had spoken to the in-house lawyer, Ms. Hauserman, and conveyed her legal advice in response to the questions. The emails are privileged. *Dolby Labs.*, 402 F. Supp. 3d at 866.

After Plaintiffs sent their meet-and-confer letter, counsel for the parties had a telephone conference to discuss Plaintiffs' challenge to the privilege claim. During that conference, Plaintiffs raised a different argument. Plaintiffs now contend that because neither Mr. Bonander nor Mr. Taritero in their emails (summarized in paragraphs 1 and 3 above) specifically called out Ms. Hauserman's name, the emails from Mr. Bonander and Mr. Taritero cannot be privileged.

Plaintiffs' new argument ignores the context and back-and-forth nature of the emails. Mr. Bonander asked a question after receiving an article about a preliminary injunction involving one of Defendants' vendors. Ms. Steele responded by relaying counsel's legal advice. Mr. Taritero responded with a follow-up question; Ms. Steele again relayed counsel's legal advice. The email string is a dialogue, and the dialogue involves questions and answers that relay counsel's legal advice. The questions and the answers deal with what was obviously a legal issue, i.e., a preliminary injunction. Redacting the questions that prompted Ms. Steele relaying of counsel's legal advice is not only unwarranted, but would produce an incomplete and misleading document: it would show only the questions but not the answers to them. Plaintiffs are trying to slice a privileged discussion too thin, and doing so would create a misleading record.

Defendants recognize that the Court may wish to review the email string *in camera* in resolving this issue. The email string is very short—less than a page. If the Court would like to review the document *in camera*, Defendants will promptly submit an unredacted copy.

2. Plaintiffs' request for a copy of a privileged email with text redacted: Plaintiffs have raised a different issue concerning a different document. The document in issue is a single email, not an email string. Defendants have claimed privilege over the email and logged it at entry 99 of their privilege log. The log identifies the author (John Kilkenny of Defendant Twentieth Century Fox Film Corporation ("TCFFC")), recipients (four TCFFC employees), and date (July 13, 2016) of the email. The log also provides a description of the email without revealing the privileged information ("An email reflecting legal advice regarding MOVA litigation."). Plaintiffs do *not* challenge Defendants' claim of privilege.

Plaintiffs instead argue that Defendants should be ordered to produce the email with its header information visible but the body of the email redacted. The request is bizarre. Where a responsive document consists of a string of emails—some privileged, some not—the party producing the email string can redact the privileged content and leave the rest visible. (That is what Defendants did with the email string discussed in Section 1, above.) Where a document consists of one privileged email, the producing party can log the document, and the receiving party can decide if it wants to challenge the privilege claim. As noted, Defendants logged the document at Entry 99, and Plaintiffs have not challenged the privilege claim.

During the meet-and-confer, Plaintiffs did not provide any legal authority supporting their request. Nor did Plaintiffs explain why the email header information would be relevant to the pending summary judgment motion or any other issue in the case.[1] The privilege log entry provides Plaintiffs with all the information to which they are entitled. There is no basis for requiring Defendants to produce the email itself with text redacted.

Respectfully submitted,

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By: */s/ Kelly M. Klaus*

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[1] As with Plaintiffs' prior motion to compel the deposition of Darren Hendler, Defendants object if Plaintiffs provide any relevance argument in their simultaneously filed letter brief that Plaintiffs did not raise during the meet-and-confer.